No. 120

In the Supreme Court of the United States

October Term, 1956

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INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 180

WILLIAM L. GREENE, PETITIONER

v.

NEIL M. McELROY, THOMAS S. GATES, JR., AND ROBERT B. ANDERSON [1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 582–584, Pet. 1a–4a) is reported at 150 F. Supp. 958. The opinion of the court of appeals (Pet. 5a–23a) is reported at 254 F. 2d 944.

JURISDICTION

The judgment of the court of appeals (Pet. 23a) was entered on April 17, 1958. The petition for certiorari was filed on July 16, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

[1] The action has abated as to Mr. Anderson, who ceased serving as Secretary of the Navy on April 30, 1954, and as Deputy Secretary of Defense on August 4, 1955 (R. 35).

QUESTION PRESENTED

Whether an employee of a Government contractor has a judicially-enforceable right to access to classified contract data.

STATEMENT

Petitioner is the former General Manager and Vice President in charge of engineering of the Engineering and Research Corporation (ERCO), a corporation engaged in classified research under contracts with the Department of the Navy (R. 65). Each of the contracts, as well as a basic security agreement entered into by the parties on June 5, 1951 (R. 40), incorporated by reference the Department of Defense Industrial Security Manual (R. 41). The Manual in turn provided (R. 47, 57):

> [¶ 4. e.] The Contractor shall exclude (this does not imply the dismissal or separation of any employee) from any part of its plants, factories, or sites at which work for any military department is being performed, any person or persons whom the Secretary of the military department concerned or his duly authorized representative, in the interest of security, may designate in writing.
>
> * * * * * *
>
> [¶ 6.] No individual shall be permitted to have access to classified matter unless cleared by the Government or the Contractor, as the case may be, as specified in the following subparagraphs and then he will be given access to such matter only to the extent of his clearance. * * *

On December 11, 1951, the Army-Navy-Air Force Personnel Security Board notified ERCO and petitioner that their request that petitioner have access to classified information was denied and that his existing clearances were revoked (R. 73). Following appeal and hearing (R. 66), the Industrial Employment Review Board reversed this decision and granted petitioner access to classified information up to and including "secret" (R. 197).

On March 27, 1953, the Secretary of Defense abolished both existing boards and directed the service Secretaries to establish regional boards (R. 198). Pending the establishment of such boards, the Secretary of Defense directed the service Secretaries to grant or deny security clearances in accordance with the criteria used by the former boards (R. 199). In accordance with this authority, Secretary of the Navy Anderson, on April 17, 1953, advised ERCO as follows (R. 2):

> I have reviewed the case history file on William Lewis Greene and have concluded that his continued access to Navy classified security information is inconsistent with the best interests of National security.
>
> In accordance with paragraph 4. e. of the Industrial Security Manual for Safeguarding Classified Security Information, therefore, you are requested to exclude William Lewis Greene from any part of your plants, factories or sites at which classified Navy projects are being carried out and to bar him access to all Navy classified security information.
>
> In addition, I am referring this case to the Secretary of Defense recommending that the

Industrial Employment Review Board's decision of 29 January 1952 be overruled.

ERCO promptly complied with that request (R. 201) and at some time thereafter terminated petitioner's employment (see R. 3, 201, 569, 571, 579).

Following a request for further consideration by petitioner's attorney (R. 206), the newly-established Eastern Industrial Personnel Security Board, at the request of the Assistant Secretary of the Navy for Air (R. 62), took jurisdiction to redetermine petitioner's case. On April 9, 1954, the Board furnished petitioner a detailed statement, to the extent permitted by security considerations, of the information which had resulted in the termination of his access to classified information, all of which information had been discussed with petitioner at his prior hearing before the Industrial Employment Review Board (R. 32–34).[2]

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[2] The information was as follows (R. 32–34):

"1. During 1942 SUBJECT was a member of the Washington Book Shop Association, an organization that has been officially cited by the Attorney General of the United States as Communist and subversive.

"2. SUBJECT's first wife, Jean Hinton Greene, to whom he was married from approximately December 1942 to approximately December 1947, was an ardent Communist during the greater part of the period of the marriage.

"3. During the period of SUBJECT's first marriage he and his wife had many Communist publications in their home, including the 'Daily Worker'; 'Soviet Russia Today'; 'In Fact'; and Karl Marx's 'Das Kapital'.

"4. Many apparently reliable witnesses have testified that during the period of SUBJECT's first marriage his personal political sympathies were in general accord with those of his wife, in that he was sympathetic towards Russia; followed the Communist Party 'line'; presented 'fellow-travel-

A hearing, at which petitioner and his attorney were present, was held before the Eastern Industrial Personnel Security Board on April 28, 29, and 30, 1954 (R. 212–532). The Board heard the testimony of petitioner and his twelve witnesses and received further evidence presented by petitioner. The Government called no witnesses to testify. On the basis of this hearing, together with confidential investigation reports of the Federal Bureau of Investigation and of other investigative agencies which were contained

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ler' arguments; was apparently influenced by 'Jean's wild theories'; etc.

"5. In about 1946 SUBJECT invested approximately $1,000 in the Metropolitan Broadcasting Corporation and later became a director of its Radio Station WQQW. It has been reliably reported that many of the stockholders of the Corporation were Communists or pro-Communists and that the news coverage and radio programs of Station WQQW frequently paralleled the Communist Party 'line'.

"6. On 7 April 1947 SUBJECT and his wife Jean attended the third Annual Dinner of the Southern Conference for Human Welfare, an organization that has been officially cited as a Communist front.

"7. Beginning about 1942 and continuing for several years thereafter SUBJECT maintained sympathetic associations with various officials of the Soviet Embassy, including Major Constantine I. Ovchinnikov, Col. Pavel F. Berezin, Major Pavel N. Asseev, Col. Ilia M. Saraev, and Col. Anatoly Y. Golkovsky.

"8. During 1946 and 1947 SUBJECT had frequent sympathetic association with Dr. Vaso Syrzentic of the Yugoslav Embassy. Dr. Syrzentic has been identified as an agent of the International Communist Party.

"9. During 1943 SUBJECT was in contact with Col. Alexander Hess of the Czechoslovak Embassy, who has been identified as an agent of the Red Army Intelligence.

"10. During 1946 and 1947 SUBJECT maintained close and sympathetic association with Mr. and Mrs. Nathan Gregory Silvermaster and William Ludwig Ullman. Silvermaster

in the file of the case (R. 212), the Board, on May 10, 1954, concluded that "the granting of clearance to [petitioner] for access to classified information is not clearly consistent with the interests of national security", and so notified petitioner (R. 533, 534).

On February 2, 1955, the Secretary of Defense established the Industrial Personnel Security Review Board and gave it jurisdiction to review adverse decisions of the regional boards (R. 538, 561). Petitioner duly appealed to that Board, filing a brief and supporting affidavits (R. 62–A). By letter of March 12, 1956, the Board notified petitioner that it had affirmed the decision of the Eastern Industrial Personnel Security Board on the ground that it was supported by substantial evidence (R. 62–A).[5]

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and Ullman have been identified as members of a Soviet Espionage Apparatus active in Washington, D. C., during the 1940's.

"11. SUBJECT had a series of contacts with Laughlin Currie during the period 1945–48. Currie has also been identified as a member of the Silvermaster espionage group.

"12. During the period between 1942 and 1947 SUBJECT maintained frequent and close associations with many Communist Party members, including Richard Sasuly and his wife Elizabeth, Bruce Waybur and his wife Miriam, Martin Popper, Madeline L. Donner, Russell Nixon and Isadore Salkind.

"13. During substantially the same period SUBJECT maintained close association with many persons who have been identified as strong supporters of the Communist conspiracy, including Samuel J. Rodman, Shura Lewis, Owen Lattimore, Ed Fruchtman and Virginia Gardner."

[5] The letter stated (R. 62–A–62–C):

"After a review of all the information in the case * * * the Review Board has entered its determination in this matter. This determination, which affirms the decision of the Eastern Industrial Personnel Security Board entered on May 10, 1954,

On August 20, 1954, before the final review board had been created, petitioner instituted this action in the district court, but no action was taken before that board's decision and the pleadings were appropriately amended. Petitioner sought a judgment (a) declaring that the acts of the defendants "in advising

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is that, on all the evidence, Mr. Greene's access to classified information is not clearly consistent with the interests of national security.

"In reaching this determination, the Review Board reviewed the findings of the Eastern Industrial Personnel Security Board in accordance with its mandate under the above regulation, and determined that there was substantial support for said findings in the evidence and other material before the Review Board.

"The findings of the Appeal Division, Eastern Industrial Personnel Security Board included, among other things, the following:

"1. That during the period from 1942 to 1947, knowing of their activity on behalf of the Communist Party and sympathizing with it, Mr. Greene associated closely with his ex-wife, Jean Hinton, Mr. and Mrs. Richard Sasuly, Mr. and Mrs. Bruce Waybur, Martin Popper, Russell Nixon, Isadore Salkin, Shura Lewis, and Samuel J. Rodman, all of whom were members of the Communist Party or active in its behalf.

"2. That in 1946 and 1947, knowing of their sympathy for the Communist Party, Mr. Greene associated closely with Mr. and Mrs. Nathan Gregory Silvermaster, William Ludwig Ullman, and Lauchlin Curry, all of whom have engaged in espionage on behalf of the Soviet Union.

"3. That for a number of years beginning in 1942, Mr. Greene maintained a sympathetic association with a number of officials of the Soviet Embassy, as set out in the Statement of Reasons furnished to him.

"4. That from 1942 to 1947 Mr. Greene's political views were similar to, and in basic accord with, those of his ex-wife, Jean Hinton.

"5. That Mr. Greene was a member of the Washington Book Shop Association; invested money in and became a director of

plaintiff's employer that plaintiff could not be employed, illegal, null, void and of no effect"; (b) restraining the defendants from "doing any act in pursuance of the said illegal declaration that plaintiff is not entitled to be employed by" ERCO; and (c) requiring defendants to advise ERCO that the letter of April 17, 1953, is null and void (R. 8).

A stipulation of facts having been filed (R. 64), both parties moved for summary judgment (R. 566, 569, 570, 580). The district court granted summary

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the Metropolitan Broadcasting Corporation; attended a function of the Southern Conference of Human Welfare; and had in his home a number of Communist publications as set out in the Statement of Reasons furnished to him.

"6. That Mr. Greene's credibility as a witness in the proceedings before it was doubtful.

"In reaching its determination in this case, the Review Board concluded, on the basis of the above findings, that Mr. Greene had been in close contact with a number of individuals who were either trusted officials of the Soviet Union or members of the Communist Party actively engaged in its work; that these associations were undertaken and continued with knowledge of the sympathies and activities of these individuals; and that he has been sympathetic towards the Communist Party and the Communist movement.

"In addition, the Appeal Division, Eastern Industrial Personnel Security Board, had strong doubts as to Mr. Greene's credibility as a witness. These doubts were shared by the Review Board. This lack of credibility goes to the heart of the concept of trustworthiness, upon which all security clearances ultimately rest.

"Longstanding policy has dictated that only those persons who are determined to be trustworthy shall have access to classified information (For the latest expression see EO 10501). The Review Board found that such a determination could not be made in Mr. Greene's case, and, therefore, that the decision of the Appeal Division, Eastern Industrial Personnel Security Hearing Board, must stand."

judgment for respondents, holding that petitioner's discharge resulted solely from his employer's willing agreement to abide by security requirements; that in so contracting the Government was acting properly to "protect itself against threats to its survival"; and that petitioner accordingly had shown no "invasion of his legal rights" (Pet. 3a). The court of appeals unanimously affirmed, holding that the industrial security program was fully authorized and was not unreasonable in its coverage or procedures and that the lack of "confrontation" and full disclosure of the FBI reports did not, in the circumstances of this case, violate petitioner's constitutional rights (Pet. 5a–22a).

ARGUMENT

The relief petitioner seeks is neither more nor less than a mandatory injunction that he be given access to classified defense information in the course of his employment by a private contractor. That is relief which the courts cannot give. To do so would usurp the responsibility of the executive for the preservation of the national security. It would require the courts to determine as a fact that petitioner may be trusted with military secrets and to assume the responsibility for the accuracy of that prediction. Clearly these are functions which the judiciary cannot properly assume. Thus, whatever the merits of petitioner's claims, he cannot be given the specific relief he seeks. This case, therefore, presents no occasion for the consideration of the questions on the merits petitioner seeks to raise.

Moreover, while we think it unnecessary to reach the question, no legal wrong has been inflicted upon petitioner. The executive department is clearly authorized to determine who shall have access to classified information; it denied petitioner such access on grounds directly related to the ends of national security; and, whether or not required to do so, it afforded petitioner a full hearing consistent with safeguarding confidential information. No more is required.

1. As the court of appeals noted, this case is not like those where the courts have given the Government the alternative of revealing secret information or of suffering some other consequence, such as foregoing prosecution (cf. *Jencks* v. *United States,* 353 U. S. 657). Here there is no alternative: petitioner seeks an order specifically compelling disclosure to him of classified defense information. The only alternative of any benefit to petitioner—to condition the order upon petitioner's being given a hearing with confrontation and full disclosure of the evidence against him—would equally require the disclosure of information which the executive department has determined cannot be disclosed without compromising the national security—to wit, the contents and sources of the investigation reports.[4] Hence the relief sought would necessarily require disclosure, under compulsion of law, either of classified military contracts or of

[4] The Government has also, of course, the final alternative of giving petitioner a clearance and then terminating its classified contracts with ERCO. See p. 18, *infra*. That alternative, however, would effectively nullify the relief prayed for.

equally confidential investigation reports (possibly revealing, for example, the identity of informers within the communist apparatus). No court has ever so ordered the executive department to disclose confidential information relating to the national security to one whom that department does not consider is trustworthy.

Whether, if petitioner has been wrongfully injured, he would have an action for damages against the United States and whether Congress has consented to such a suit are questions not now before the Court. But see *Dupree* v. *United States,* 247 F. 2d 819 (C. A. 3); *Dupree* v. *United States,* 141 F. Supp. 773 (C. Cls.). The only question is whether petitioner is entitled to compulsory process requiring the executive department to disclose military secrets to him, and on that question there can be no serious dispute.

2. Petitioner's arguments on the merits misconceive the nature of the action taken by the Government. This is not a case where the Government has asserted regulatory power over an industry or a class of persons at large by creating a general bar to employment. That was true in each of the cases relied upon by petitioner: in *Parker* v. *Lester,* 227 F. 2d 708 (C. A. 9), where Coast Guard clearance was required as a condition precedent to employment as a seaman by private ship owners; in *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, where admission to the bar was a prerequisite to the private practice of law; in *Cummings* v. *Missouri,* 4 Wall. 277, and *Ex parte Garland,* 4 Wall. 333, where adherents to the Confederacy were barred from teaching and the practice of law; and in

Truax v. *Raich*, 239 U. S. 33, where employment of aliens in excess of a prescribed number was forbidden.

Here the Government has asserted no power other than the power to refrain from giving contracts for secret military equipment to contractors whose employees it does not fully trust. Rather than withhold contracts altogether from such contractors, however, it has given the contractor the choice of agreeing to keep the secret information out of the hands of such employees. However viewed, therefore, the question presented is no more than this: may the Government refrain from placing secret military information in the hands of persons whom it suspects of being untrustworthy?

We do not deny that such action by the Government may have serious practical consequences to an individual denied access to classified information. His inability to work on classified Government contracts, together with his employer's understandable reluctance to forego such contracts, may well make his continued employment by the contractor no longer economically feasible, and the same may well be true of other employers in the industry in which he has specialized talents. But that the practical consequences may, in a given case, be the same as the consequences of a legal disability does not mean that the two types of governmental action are to be judged by the same standards. They remain very different in nature.

What the Government has done here is no different from what a private manufacturer would clearly be free to do to protect its trade secrets. That does not dispose of the case, for there remains the question

whether the Government is less free to act in that manner simply because it *is* the Government. But it is question-begging to confuse that question, as the petitioner does, with the power of the Government, acting in a regulatory or legislative capacity, to impose legal disabilities upon private persons.

The problem, therefore, is not whether the Government may "bar" petitioner from employment in his chosen occupation, or even whether it may "cause" his discharge by a single employer. Rather, while the practical consequences are no doubt relevant considerations, the only meaningful formulation of the issue is whether the Government is required to turn over to petitioner secret military information.

3. Petitioner does not contend that the procedures by which he was denied clearance violated any statutes or regulations. He thus derives no support from cases such as *Peters* v. *Hobby*, 349 U. S. 331; *Cole* v. *Young*, 351 U. S. 536; and *Service* v. *Dulles*, 354 U. S. 363. He does seemingly suggest that there is a total absence of authority for the executive department to determine who shall have access to classified information, but that contention, which was fully answered by the courts below, may be dismissed as wholly without substance. While there are numerous statutory provisions from which such a power could, if necessary, be inferred,[5] the

[5] See, *e. g.*, 18 U. S. C. 798, providing criminal penalties for the unauthorized disclosure of "classified information," and §§ 2 (c) (12) and 4 (a) of the Armed Services Procurement Act, authorizing contracts to be negotiated without advertising when the contract "should not be publicly disclosed" and providing that such contracts "may be of any type which

short answer is that the general power to safeguard military secrets is necessarily inherent in the duty of the executive department to preserve the security of the nation.

Petitioner thus necessarily rests on the assertion that, by being denied access to classified information, he has been deprived of liberty or property without due process of law, in violation of the Fifth Amendment to the Constitution. More specifically, inasmuch as petitioner was given a detailed specification of charges and a full opportunity to present evidence before being denied clearance, it is apparent that petitioner's claim is that he can be denied access to classified information only after a hearing in which all the evidence against him is disclosed and he is given the opportunity to cross-examine the informants.

Petitioner's position is wholly novel. It is true that a right of "confrontation" has been asserted as a constitutional prerequisite to a discharge from Government employment on "loyalty" grounds—an assertion that this Court has never found it necessary to reach. See, *e. g.*, *Peters* v. *Hobby*, 349 U. S. 331. But even in those cases it has never been suggested that the Government was not entitled to withhold classified information from the employee even if it could not fire him. Thus Mr. Justice Doug-

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in the opinion of the agency head will promote the best interests of the Government." 41 U. S. C. (1952 ed.) 151 (c) (12), 153 (a), later recodified with minor changes as 10 U. S. C. (Supp. V) 2304 (a) (12), 2306 (a).

las, although concurring in *Peters* v. *Hobby* on th ground that a discharge without confrontation wa unconstitutional, nevertheless recognized that "If th sources of information need protection, they shoul be kept secret" (349 U. S. at 352), implyin that in that event the information should not be use as a basis for discharging the employee. The crucia difference is that in those cases it was open to th Government, if it doubted the employee's trustworthi ness but was prevented by security consideration from disclosing the full basis for those doubts in a open hearing, to move the employee to a nonsensitiv position. It was only the further act of dischargin the employee that was alleged to require "confron tation." Thus whatever the merits of the constitu tional claim in the employee discharge cases, it has n application here, where the precise question is no whether an employee should stay on the Governmen payroll but whether an employee of a defense con tractor should be allowed access to classified defens information.

Petitioner's constitutional claim is, moreover, a lacking in merit as it is novel. Petitioner has n "right", in any meaningful sense, to have access t Government secrets. That being so, it is difficult t see how he has been deprived of any "property" o "liberty" within the meaning of the Fifth Amendment If he has any constitutional right relevant to the issu here, therefore, it would be at most a right not to b treated discriminatorily—that is, a right not to b denied a privilege accorded to others arbitrarily or o

grounds not rationally related to an appropriate governmental purpose. Here, however, there can be no serious contention that the charges against petitioner—the essential facts of which were admitted at the hearing—did not afford a rational basis for denying him access to classified information or that the board acted capriciously.

What petitioner argues, rather, is that he has an absolute right not to be denied clearance without being afforded an opportunity to confront and cross-examine those who informed against him. No doubt it is a desirable policy of government to afford to those who will be injured by its action the maximum procedural safeguards which can be given consistent with the conflicting interests that must be served. Petitioner's underlying premise that that policy is a *constitutional* requirement cannot be so readily accepted. For purposes of this brief, however, it is enough to observe that petitioner has in fact been given appropriate procedural safeguards consistent with the requirements of national security.

Petitioner was given a complete specification of the charges against him, including in detail the names of the alleged communists and espionage agents with whom he was reported to have had a close association, and the dates of the associations. He was given a full hearing at which he was afforded every opportunity to explain the implications of his admitted associations and to introduce evidence and witnesses in his own behalf. He was fully represented by counsel throughout the proceedings. It was expressly determined,

however, that the confidential FBI reports available to the board and the identity of the informants from whom the information was obtained could not be disclosed to petitioner without impairing the national security. It is this omission of which petitioner complains.

Admittedly the use of confidential informants and the nondisclosure of sources of information deprive the individual affected of a full opportunity to answer the charges. But the executive department, equally aware of the dangers of the system, has determined that the considerations weighing against full disclosure are of overwhelming importance. That appraisal of the competing interests, based as it is on extensive information not available to the courts, would seem necessarily to be controlling here.

Nor is this a case where the executive can properly be required not to use the information if it is not willing to disclose it. While that is a conceivable solution in a federal employee discharge case—where the employee can, to some extent, be removed from access to classified information without being discharged—it is precluded here by the very object of the proceedings. The result of requiring the Government to grant the petitioner access to classified information unless it is willing to disclose the identity of its informers is, as noted above, necessarily to force disclosure of one of the two types of confidential information. The suggestion that the Government is under a constitutional compulsion to choose one of

these two compromises of the national security is surely without merit.

4. Finally, a requirement that the Government grant a clearance to a contractor's employee unless it is willing to disclose the sources of its information would frequently deprive the Government of the use of facilities essential to the national defense. Having been required to grant a contractor's employee a clearance notwithstanding confidential information that the employee is untrustworthy, the contracting agency could not, consistently with its duty to protect military secrets, continue to award classified contracts to the contractor and might, indeed, be obliged to terminate the existing contract. Although other equally-qualified contractors would no doubt be available in many cases, at least in peacetime, the particular contractor might often have facilities, capacity, or engineering talent that cannot be replaced. In those cases the Government would be faced with the dilemma of either disclosing the sources of its confidential information or foregoing the services of an essential contractor. The practical problem is greatly increased, moreover, by the fact that a contractor's employees, unlike Government employees, cannot feasibly be screened by the Government before they are hired. If such an employee, discovered after hiring to be untrustworthy, is to be kept from secret military information, it can be done only by the contractor's withholding of information from the employee or the Government's withholding of contracts from the contractor.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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